Supreme Court, U.S.
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No. 97-641

In The

Supreme Court of the United States

October Term, 1997

BRENDA PREMO, Director of the Department of Rehabilitation, State of California,

Petitioner,

vs.

JEANA MARTIN; THE UNITED STATES DEPARTMENT OF EDUCATION; RICHARD W. RILEY, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT JEANA MARTIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Jeana Martin hereby undertakes her own statement of the questions presented on this petition, convinced that the petition's version not only suffers from lack of adequate focus in the substantive sense, but also ignores entirely threshold issues militating against this Court's intercession.

The overarching question on this petition is whether the petition sets forth "compelling reasons" for granting it in accordance with the criterion prescribed by this Court's own Rule 10.

Subsumed at the threshold as to all the questions claimed in the petition to be involved are issues as to whether this Court should decline to intercede in view of postures chosen by petitioner below which were redolent of lulling concession, invitation, and/or waiver and consent.

More accurately framed (absent foreclosure at the threshold), the questions said by the petition to be presented should be:

(a) Whether, by electing to have agencies of theirs agree to the terms and conditions imposed by Congress to qualify as state licensing agencies administering at the state level the federal program for the benefit of the blind created by the Randolph-Sheppard Act (20 U.S.C. §§ 107, *et seq.*), participating States have consented to waive the Eleventh Amendment of the United States Constitution and expose themselves to potential suit in federal court.

QUESTIONS PRESENTED – Continued

(b) Whether state licensing agencies undertaking administration of the Randolph-Sheppard Act have been left by Congress with complete and unfettered discretion not to take the remedial action authorized by the Act against federal agencies violating the Act, regardless of how clear the violations and resulting harm to the blind beneficiaries of the Act may be.

(c) Whether arbitration panels convened under the Randolph-Sheppard Act to arbitrate disputes between blind vendors and state licensing agencies are powerless to fashion relief commensurate with the scope of inquiry and have not been given authority by Congress to grant a vendor relief inclusive of monetary damages even if the panel finds such relief to be appropriate in the circumstances proved by the vendor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

BRIEF OF RESPONDENT JEANA MARTIN IN OPPOSITION TO PETITION FOR CERTIORARI 1

PROVISIONS OF LAW 1

CORRECTIVE STATEMENT OF THE CASE 3

1. The Arbitration 3

2. The Proceedings in the District Court 9

3. The Court of Appeals' Opinion 11

REASONS FOR DENYING THE PETITION 12

I. The Complete and Absolute Discretion Question 12

II. The Panel Power Question 16

III. The Eleventh Amendment Question 21

IV. The Practical and Equitable Considerations Calling for Denial 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

Burlington Northern, Inc. v. American Ry. Supervisors Ass'n, 527 F.2d 216 (5th Cir. 1975) 23

Delaware Dept. of Health v. U.S. Dept. of Educ., 772 F.2d 1123 (3rd Cir. 1985) 19, 21, 24, 26

Ernst & Ernst v. Hockfelder, 425 U.S. 185, *rehearing denied* 426 U.S. 986 (1976) 13

Fillinger v. Cleveland Society for the Blind, 587 F.2d 336 (1978) 25

Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992) 19, 25

Georgia Dept. of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990) 14, 19, 20

Glen Falls Indemnity Co. v. United States, 229 F.2d 370 (9th Cir. 1955) 23

Mass. Elected Committee of Blind Vendors v. Matava, 482 F.Supp. 1186 (1980) 25

Matter of Arbitration Between Intercarbon Bermuda, 146 F.R.D. 64 (S.D.N.Y. 1993) 23

McNabb v. U.S. Dept. of Educ., 862 F.2d 681 (8th Cir. 1988) 19

Port Authority Trans-Hudson Corp. v. Fenney, 495 U.S. 299 (1990) 26

Randolph-Sheppard Vendors of America v. Weinberg, 795 F.2d 90 (D.C. Cir. (1986) 15

State of N.Y. v. U.S. Postal Service, 690 F.Supp. 1346 (S.D.N.Y. 1988) 15

TABLE OF AUTHORITIES – Continued

Page

Taylor v. Freeland & Kronz, et al., 503 U.S. 638 (1992) 13

Tenn. Dept. of Human Serv. v. U.S. Dept. of Educ., 979 F.2d 1162 (6th Cir. 1992) 19, 26

United States v. L.A. Tucker Truck Lines, 344 U.S. 33 (1952) 13

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 18

STATUTES:

5 U.S.C. § 702 20

5 U.S.C. § 703 ..... 2, 24, 25

5 U.S.C. § 706 ..... 2, 13

20 U.S.C. § 107(a) 1

20 U.S.C. § 107(b) 1, 17

20 U.S.C. § 107(b)(6) 18

20 U.S.C. § 107d-1(a) 1, 14, 18, 23

20 U.S.C. § 107d-1(6) 1

20 U.S.C. § 107d-2 18

20 U.S.C. § 107d-2(a) 1, 23

20 U.S.C. § 107d-3(b)(1) 2

TABLE OF AUTHORITIES – Continued

Page

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 13 ..... 2, 23

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Rule 10 ..... 3, 16, 21, 26

OTHER AUTHORITIES:

Calif. Welf. & Inst. C. § 19629 18

Eleventh Amendment of the United States Constitution ..... *passim*

BRIEF OF RESPONDENT JEANA MARTIN IN OPPOSITION TO PETITION FOR CERTIORARI

PROVISIONS OF LAW

With the caveats and the clarifications now to be indicated, respondent Jeana Martin (hereafter often "Ms. Martin") does not disagree with the petition's submission under the heading, "Constitutional and Statutory Provisions," as far as it goes. Also of particular importance and interest here are provisions unmentioned in the petition.

As to the Randolph-Sheppard Act, Ms. Martin views the petition's submission as too summary and fragmented for adequate appreciation in several important respects. More inclusive quotation of the Act is set forth and attached hereto as Appendix 1 to facilitate ready and deserved verbatim attention in general and as to the following in particular:

(a) The Act's unmistakable purpose and intent of creating a program for the economic benefit of the blind by establishment for them of a "priority" to engage in vending operations generally on federal property, including vending machine operations, and to be honored by the various federal agencies respectively in charge of properties subject to the Act (20 U.S.C. § 107, subdivisions (a) and (b), App. 1 hereto, pp. 1-2);

(b) The wide-ranging commitments required of state agencies in voluntarily seeking to qualify as state licensing agencies to implement and administer the program at the state level, including the commitment to observe the detailed procedure provided to resolve "any" dispute between them and blind vendors in their charge (20 U.S.C. §§ 107b, subdiv. (6) and 107d-1, subdiv. (a), App. 1 hereto, pp. 3-4); and,

(c) Inclusion in that procedure (20 U.S.C. §§ 107d-1(a) and 107d-2(a), App. 1, p. 4) of arbitration whose outcome shall be "final and binding" unless appealed under the Administrative Procedures Act.

Lest there be confusion due to the petition's reference generally to the responsibilities and services under the Act of a state licensing agency (hereafter "SLA"), the phrase "to

negotiate with federal agencies to obtain locations for vending facilities upon federal property" (at p. 2), should not be understood to mean that federal agencies in charge of property have been left free by the Act to allow vending operations by others than the blind unless and until the SLA persuades the federal agency to do otherwise through negotiation. The vending priority of the blind on properties under the Act is imposed by the Act itself in the provisions cited above upon those in charge of the property (although such things as location design, products to be sold, etc., are "negotiated" by the SLAs).

The provisions of the Act buttressing the priority of the blind as to vending machines outside a vendor's facility but located on the same property have two especially noteworthy aspects in regard to a situation like Ms. Martin's. If such machines are not in "direct competition" with the vendor's facility, the vendor is to receive thirty percent of the income derived from them, but, if they are in such "direct competition," the vendor is to receive "100 per centum" of the income produced. (20 U.S.C. § 107d-3(b)(1).)

As to the Administrative Procedures Act (hereafter "the APA"), referred to by the Randolph-Sheppard Act, the petition omits an important aspect of the APA section (5 U.S.C. § 706) regarding the things to be considered given due challenge of final administrative action. That APA section makes it clear that responsibility of the reviewing courts does not invariably extend to all the matters specified but only to those necessary to decision "and when presented."

Omitted in its entirety in the petition is the APA section providing that, absent a different specification in the enactment involved, the proper court in which to challenge an administrative agency's final action is any "court of competent jurisdiction." (5 U.S.C. § 703.) That section also makes it clear that, "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

Two rules are so crucial here as to merit special attention at this juncture. One is Rule 13 of the Federal Rules of Civil

Procedure, relating to counterclaims (reproduced and attached hereto as Appendix 2). The other is this Court's own Rule 10 which cautions that certiorari petitions will be granted "only for compelling reasons," and it makes clear that even conflicts of courts of appeals' decisions with one another or with the decision of this Court on an "important" federal question merely indicate the character of reasons considered by this Court but do not control or fully measure the Court's discretion.

CORRECTIVE STATEMENT OF THE CASE

Regrettably, Ms. Martin is forced to submit her own statement of the case in considerable detail in order to overcome the mischief worked by the petition.[1] Her concern is that, in various objectionable ways and more, perhaps, by what it has ignored than by what it has narrowly and selectively discussed, its version is apparently and unfortunately designed to convey the misimpression that, at all stages below, each of the questions and related contentions now advanced should have been decided in favor of, and was diligently pursued by, the State but fell on deaf ears.

1. The Arbitration

To the extent stated or intimated in the petition's account of the arbitration, every aspect of the following is fallacious and objected to: (a) that Ms. Martin's arbitration complaint and supplemental complaint and the panel's decisions and awards dealt with nothing more than a wrong committed by the Postal Service, rather than any wrong directly attributable to the State itself; (b) that the Postal Service's only violation of the Act at issue was the withholding of income from vending machines not part of Ms. Martin's location but in the same building; (c) that, "specifically," the loss of income from those vending machines related to a relatively short two-

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[1] Although the federal respondents' "Statement" is a definite improvement, further attention as to several important features is called for.

year period beginning in September 1989 during which that loss resulted from the low-pricing "break-even" contract between the Postal Service and a private competitor of Ms. Martin, which contract was terminated with reasonable speed through the Department of Rehabilitation's arbitration proceeding ultimately begun against the Postal Service and culminating in a settlement putting things to right; (d) that, in finding the State liable for all Ms. Martin's harm solely on the basis of the State's failure to take formal remedial action against the Postal Service sooner, the panel conjured up a "non-discretionary" obligation of SLAs under the Act to pursue, as protectors and surrogate agents of the vendors, all grievances to litigated conclusion if necessary regardless of merit; (e) that the panel based the existence of such an obligation on a single provision, rather than on the language and spirit of the Act as a whole; and (f) that the relief awarded consisted of only money damages granted in disregard of the State's diligent claim that the panel lacked power to award such damages, as a matter of statutory construction of the Act itself.

All such insinuations are not only contrary to fact but are belied in all essential respects on the faces of the panel's liability and remedies decisions and awards, which the State could not escape attaching to its petition (Appendices C and D). Without here engaging in detailed repetition of those decisions, which speak eloquently for themselves, we note a few points in demonstration of the thorough and thoughtful way in which the evidence and contentions in actuality then put before it by the parties were considered and disposed of by the panel.

It took more than seventeen pages of the liability decision for the panel's initial reference to the background and evidentiary considerations it found persuasive in Ms. Martin's favor on her claims of multi-faceted and disastrously harmful wrongdoing by the State. In prelude to its dispositive discussion of liability (Pet. App. C, p. 18) the panel summarized its views as follows:

> "Upon the complaint and supplement to the complaint, the evidence adduced at the hearing, the

> documentary evidence submitted by the parties, the post-hearing briefs of the parties, and the entire record herein, the Arbitration Panel finds that Respondent violated the letter and spirit of the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107e ("the Act"), as set forth below, in its relationship with Complainant. The testimony and documentary evidence establish the validity of the Complainant's claims against Respondent. Respondent failed to protect the program or uphold the law as it was bound to do under the assurances it gave the Secretary of Education in exchange for its designation as a State Licensing Agency ("SLA") pursuant to the Act.
>
> "In broad terms, the State violated the spirit and letter of the Act by failing to protect the priority accorded blind vending facilities under the Act; by failing to insist upon remittance to the State's blind vending program of all vending machine income to which blind vendors were entitled; by failing to stand firm against the promulgation and continuation of a break-even contract which proximately and directly led to Complainant's economic demise; and finally, by terminating without sufficient foundation Complainant's license and her means of self-support. Those failures, taken together, represent a substantial violation of the State's assurances to the Department of Education. . . . "

(To the same effect, see Pet. App. C, p. 24.)

In the amplifying discussion which followed, the panel stressed: (a) that Ms. Martin's income loss did not simply relate to the withholding from her of vending machine income as such but also to her loss in her own vending operations due to the deflection of patronage to the subject machines; (b) that the wrongdoing violative of her priority under the Act was not limited to the two-year period during which the "break-even" contract was in force but to the entirety of her tenure at the facility, beginning in 1985 and ending in 1991; and (c) that, based on both documentary evidence and the panel's own visit

to the site, it was obvious that the subject vending machines had been in "direct competition" with Ms. Martin's facility, thus entitling her to one hundred percent of the income they produced. (Pet. App. C, pp. 14, 17, 19-23.)

The reality is that, as the matter was tried before the panel, the contest focused on factual issues, not legal ones. The strategy of the State at the arbitration (perpetuated in the courts below but now wisely dropped) was to prove that the State acted reasonably and that Ms. Martin's financial misfortunes could not reasonably be found to have resulted from the matters complained of by her because, in truth, her economic collapse was due to nothing more than her own incompetence, irresponsibility, and lack of qualifications as a successful vendor. The supporting evidence detailed by the panel (Pet. App. C, pp. 8-18) was strong, much of it being documentary in character and essentially irrefutable, particularly since it was authored by the Department of Rehabilitation itself. Such was the case as to the State's blame-shifting stratagem, as the liability decision expressly pointed out in detail in rejecting the idea. The panel stressed that it found more credible than witnesses produced by the State years after the fact the glowing evaluations and other Department documentation to the effect that, even in the midst of her financial difficulties, Ms. Martin was an excellent and exceptionally qualified vendor, one of the best in the program. (Pet. App. C, pp. 22-23.)

Nowhere did the panel make, or have any need to make, reference to a "non-discretionary" obligation of SLAs to pursue claims against federal agencies for violations of the Act to litigated conclusion even if perceived to lack merit. Nor, conversely, did the State make, nor would have wanted to make, its present contention that SLAs in all events have absolute discretion under the Act not to take any formal action at all against offending federal agencies even if their violations of the Act are clear. Indeed, as noted by the panel (Pet. App. C, pp. 18-24), the Department evidenced in various ways its awareness of its obligations under the Act to take formal action against a federal agency's continuing conduct in violation of the Act.

For example, on October 6, 1989, just a month after the "break-even" contract had taken effect, an official in the Department wrote a letter, reproduced and attached hereto as Appendix 3, warning the Postal Service that the contract was in clear violation of the Act and had already shown it would reduce Ms. Martin's income by more than fifty percent and that, unless the problem was quickly resolved, the Department "will be forced" to take the remedial steps allowed by law. Actually, as noted by the panel (Pet. App. C, pp. 21-22), the Department had demonstrated awareness of its responsibility under the Act before Ms. Martin even began her tenure by maintaining a successful arbitration against the Postal Service which established that a "break-even" contract affecting a vendor in San Francisco was illegal.

Also, the fact is that, after allowing a year to elapse following the warning of October 1989 (and transparently in an effort to diffuse Ms. Martin's appeal to the Department's Appeals Board commenced by her months earlier but then scheduled to be heard a week away), the Department did belatedly begin an arbitration proceeding against the Postal Service in regard to the illegal contract affecting Ms. Martin, albeit a proceeding allowed to languish until after Ms. Martin left the affected location in 1991 and so wanly pursued as to result in a settlement which, although ameliorating the situation to some extent as to the future, absolved the Postal Service from having to pay anything to Ms. Martin to redress the financial disaster she was caused to suffer during her tenure.

At no point in the arbitration did the State make a contention, as it does now, that arbitration panels under the Act, as a matter of purely statutory construction independent of the Eleventh Amendment, lack any power or authority to grant deserving blind vendors relief in the form of money damages. To the contrary, the State affirmatively recognized the panel's power to award damages. A telling example is the conclusion of the State's brief in support of its motion to

dismiss made before the arbitration hearing even began.[2] The relevant page of that brief is reproduced and attached hereto as Appendix 4.

And the relief the panel proceeded to grant was hardly limited in the way indicated in the petition. The remedial award granted no damages at all in regard to the "break-even" contract, with the explanation that an overlap might occur in view of the award being made to redress the harm done by violation of Ms. Martin's priority throughout her tenure. (Pet. App. D, p. 3.) Also contrary to the intimations in the present petition, damages were awarded for the State's own protracted failure to perform the needed and promised remodeling and upgrading of Ms. Martin's location. (*Id.* at p. 4.) In regard to the Department's wrongful revocation of her vending license, the relief ordered by the panel was only futuristic in reach and was essentially injunctive in character. The Department was ordered to restore her license and to place her "forthwith" in a vending facility within the State's blind vendor program producing monthly income of $5,731.94, the amount found to be what she would be currently earning at her former Postal Service facility after cure of the harmful wrongs to which she had been subjected. Accordingly, in the event of delay by it beyond January 31, 1995, in implementing the injunctive relief, the State was ordered to pay Ms. Martin $5,731.94 for each month until that relief was in fact implemented. (*Id.*, at p. 6.)

Noteworthy also in view of the shortcomings of the arbitration the petition alludes to is that the panel expressly reserved jurisdiction of the matter for ninety days following its decision "for the purpose of receiving any motion, information, or other matter related to the effectuation of the Panel's decision and award." (*Id.*, at p. 6.) The State did not avail itself of that continued jurisdiction. Instead, without

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[2] The understandably unsuccessful motion to dismiss was based on the theory that, as a practical matter, the arbitration would be a pointless waste of time because, assertedly, the only relief the panel would award if finding for Ms. Martin would be damages and such relief could not be enforced in federal court by reason of the Eleventh Amendment.

giving the panel opportunity to cure any perceived error, the State hurried to the District Court.

2. The Proceedings in the District Court

As to what actually happened in the District Court, the petition is also muffling and misleading. This is true not only as to whether the State was duly diligent in pursuing there all the questions and contentions it now asks this Court to consider, but also as to the fact that Ms. Martin as a defendant put in issue before the District Court from the start confirmation and enforcement of the arbitration awards in her favor the State came to the court as a plaintiff to attack.

At no time prior to the District Court's judgment did the State include in its pleadings, in spite of being allowed to amend the original twice, any allegations challenging the arbitration awards on two of the three grounds now urged. The pleadings did not challenge the award on either the ground that the Act does not authorize damages relief or on the ground that the panel had disregarded the complete discretion of SLAs not to take remedial action on behalf of aggrieved vendors against federal agencies violating the Act. The State's second amended complaint challenged the awards on grounds in addition to the alleged unenforceability in federal court because of the Eleventh Amendment (Pet. App. B, pp. 15-20), but they involved the claimed denial of due process resulting from the participation of two persons in the arbitration (a claim not now made).

From the inception in response to the State's pleadings, Ms. Martin filed not only denying answers but also counterclaims affirmatively alleging the validity of the arbitration awards in all respects and praying that the court uphold them and order their enforcement forthwith. (Pet. App. B, p. 20.)

As agreed by the parties, the District Court resolved the action as a matter of law on the basis of the arbitration record and upon appropriate cross-motions by the parties to assist the court to that end. It is true, as indicated in the petition, that, in the course of its motion for disqualification of the panel, for reversal of the awards and for convening of another panel to

arbitrate the matter anew, the State attempted to interject claims of error additional to those it had pled, including the complete-discretion claim now urged. Those bare bones, however, hardly tell, and even hide, the full and strange story.

The fact is that, in its initial memorandum in support of the disqualification/remand motion, the State openly acknowledged just the opposite of what is now argued. It said that the Act "imposes an obligation" on a SLA to "protect" the vendor's "priority" and that the SLA "must" pursue a vendor's grievance when the vendor's "rights" are "arguably" being jeopardized by a federal agency's actions. (See, Memorandum pages 12-13 reproduced and attached hereto as App. 5.)

Later, in the reply to the defendants' oppositions to its motion, the State made a remarkable about-face. Having apparently discovered to its chagrin that a District Court decision influencing its acknowledgment of obligation had been overruled on appeal, the State did not hesitate to change horses in mid-stream in abandonment of its opening position and to invoke some broad language in the appellate decision that SLAs have complete and unfettered discretion both as to whether a federal agency is in fact violating the Act and as to whether it should in all events be subjected to formal remedial action by the SLA. (Memo., pp. 5-6, reproduced and attached as App. 6.)

Disposing with particularity of the issues pled but obviously in light of its own review of the arbitration record, the District Court concluded, "For the reasons expressed above, and after reviewing the record of the arbitration proceedings, the Court finds that the orders of the arbitration panel were adequately supported by the evidence, and were not arbitrary, capricious, or an abuse of discretion." It denied the State's motions and granted those of the defendants, including Ms. Martin's motion for summary judgment on her counterclaim. (Pet. App. B, p. 20.) Judgment was entered accordingly,

including the order that the State "shall comply forthwith" with the panel's remedial decision. (*Id.*, p. 2.)[3]

3. The Court of Appeals' Opinion

In regard to the petition's brusque treatment of the opinion of the Court of Appeals (Pet. App. A), our basic response is that the opinion speaks best for itself as to what it did and did not do. From our perspective, in affirming the judgment, it focused preponderantly on the Eleventh Amendment question, and properly so in view of what had transpired below and what was developed and contested in the briefs of the parties and at oral argument. The rejection of the Eleventh Amendment as a bar was a result reached on the basis of the Court of Appeals' careful analysis of the language of the Act, as well as the impact of the Randolph-Sheppard authority it found persuasive and the teaching of this Court in point.

The petition asserts that the State's complete-discretion contention was not addressed and that factual error was committed in saying that there was no dispute that the arbitration panel had authority to award damages as relief under the Act. That statement in the opinion certainly is in accord with the State's affirmatively taken position at the arbitration and with the absence of any pleading in the District Court departing from that position. In all events, if such faults had been genuinely perceived at the time to have importance, rather than being the outgrowth of strategy for present purposes, the State's best recourse for cure would obviously have been a petition for rehearing. The State filed none.

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[3] The court of appeals correctly held (App. A to Pet., p. 14) that the District Court's denying the State leave to amend its complaint after the judgment was a proper exercise of discretion, and the State does not now claim otherwise.

REASONS FOR DENYING THE PETITION

As to all of the three questions advanced by the petition to induce this Court's intercession, there are, we respectfully submit, two lines of analysis and reasoning against a grant, each by itself decisive. One line involves threshold considerations of the State's conduct below amounting to concession, lulling invitation, or waiver and consent. The other demonstrates the petition's failure in any event to show an occasion for a grant. Further, a denial is forcefully called for by overarching practical and equitable considerations.

I. The Complete and Absolute Discretion Question

Immediately below, beginning with the threshold impediments, we address first the purported but realistically phantom question which, for the sake of brevity, we will sometimes, as we have already to some extent, refer to as the complete-discretion or absolute-discretion question.

As we have seen, it was late in the game, indeed, before the State's lulled opponents before the District Court or the State itself, for that matter, had the slightest reason to think that the State would dare a contention that the Act vests the SLAs with absolutely unfettered and unassailable discretion not to take the remedial action authorized by the Act for them to take against federal agencies violating the Act, regardless of how clear and harmful the violations are. Certainly, no such contention had been made at the arbitration or included as an attack on the arbitration awards in the State's original district court pleading or in either of the two amendments allowed. More lulling still, of course, was the State's own acknowledgment, in its initial memorandum supporting its disqualification/remand motion, of the Act's imposition upon SLAs of a mandatory obligation to "protect" the vending priority and to pursue a vendor's grievance whenever the vendor's rights are "arguably" being jeopardized by a federal agency's actions. (App. 5, pp. 1-2.)

It should not be hard to imagine the surprise of the defendants (not to mention the court) who, having naturally relied on that acknowledgment of obligation in preparing

oppositions to the State's motion, were suddenly treated in the State's reply memorandum with a total about-face and eager embrace of the complete-discretion idea. Yet more, even though the State in the same reply alluded to its readiness to file a third amended complaint to allege attacks on the arbitration additional to its existing pleadings (App. 7 hereto), months elapsed before the judgment without the State's bothering in all that time to attempt the filing of any new pleading (Pet. App. A, p. 14).

Obviously, just because an action begins in an arbitration or administrative hearing, it should not be less subject to the rule, rooted in fairness and kindred concerns and a commonplace in the purely court setting, which bars a party from asserting on review as error anything below which the party conceded or affirmatively invited or caused or passively waived by failure to plead or object or by other acquiescent conduct. The rule has thus been applied in such cases by this Court as well as by others. (*E.g., Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638, 645-646 (1992); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, n. 13, *rehearing denied* 426 U.S. 986 (1976); *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).) At least partially, it is encouched in the APA section requiring points for review to be "presented" (5 U.S.C. 706), cited by the District Court in duly declining to consider the State's unpled attacks (Pet. App. B, pp. 19-20).

We are not unaware that, in exceptional cases involving special circumstances of a ringing equitable tenor, the general rule has been relaxed. Nothing calling for such special solicitude for the State is involved here. Quite the reverse, about which we hope to have space enough to say more later.

Substantively in any event, the petition does nothing but attempt to brew a tempest in a teapot as to the purported question of complete discretion. It is even mystifying how the present opinion of the Court of Appeals can be said in the petition to be one of the two decisions engendering conflict and confusion on the subject. The petition (at p. 7), complains of the Court of Appeals' failure even to address the issue, so it eludes ready grasp how it can also be accused of addressing the matter in a conflicting way.

Nor is it certain precisely what contribution to the elusive conflict proclaimed by the petition was truly intended to have been made by the other contestant it pushes into the ring. The majority opinion in *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990) sheds but faint light on the circumstances in that case surrounding the Marine Corps' closing of the blind vendor's facility. It is hard to tell whether or not something extenuating, such as a budgetary cutback or special military problem, may have been involved to militate against the clarity of the alleged violation. Also, there was not a hint in the opinion of protracted and repeated violations by the federal agency, let alone of the SLA's own direct and affirmative causation of harm to the vendor by anything like, as here, the SLA's own failure to remodel the facility as needed and promised and the wrongful revocation of the vendor's license. And, serving to make the obfuscation come full circle, the majority did take some pains to use qualifying expressions contrapuntal to its more sweeping utterances. For example, at the point of voicing the actual holding, the majority used the words, "at least in the present case," to tether its views to the facts there involved, which, although left unclear in what may have been other significant respects, certainly included the fact, stressed by the opinion, that the SLA had never there determined that the Marine Corps was in violation of the Act. (915 F.2d at p. 1489.)

To be sure, there is broad language in the majority opinion which, considered in the abstract and alone, can be construed as standing for an iron-clad rule that, even if a federal agency clearly violates the Act in a manner seriously harmful to a vendor, the administering SLA has been vested by the Act with absolute discretion not to take against the violator the remedial steps it authorizes. As shown in the dissent (at pp. 1495-1501), such a notion is blind to the Act's purpose and its requirements imposed upon SLAs in carrying out the priority established. It basically derives, instead, from a starkly crabbed reasoning process focusing in a vacuum on the semantic difference between the Act's provisions for vendor-SLA arbitrations (subdivision (a) of 20 U.S.C. 107d-1) and the ones for arbitrations of SLA-federal agency disputes

(subdivision (b) of that section). The word "may" in the latter, entirely appropriate to the end of general authorization dependent upon clarity and importance of violations, was hardly intended to authorize in reverse the condoning by SLAs of clear and harmful violations of the basic priority objective of the very Act SLAs have committed themselves to implement. Undeniably, besides, subdivision (a) all-inclusively mandates availability of the procedure, including arbitration, to every vendor dissatisfied with "any" SLA conduct, thus obviously not excluding SLA handling of violations by federal agencies.

At bottom, in the abstract and alone, the broad language of the majority opinion attributes to Congress the absurdity of establishing a valuable right without a reasonably certain remedy in the event of its violation by federal agencies. In that connection, it merits emphasis that, since SLAs have been made the protectors against abuses, courts have reasoned that blind vendors themselves have no standing to proceed against offending agencies. (*E.g., Randolph-Sheppard Vendors of America v. Weinberg*, 795 F.2d 90, 102-103 (D.C. Cir. 1986); *State of N.Y. v. U.S. Postal Service*, 690 F.Supp. 1346, 1350 (S.D.N.Y. 1988).) It would be a farce, indeed, if the self-same provisions were held both to bar vendors' direct efforts to get relief against offenders and to allow SLAs to refuse at whim to seek such relief for them, thus unconscionably leaving vendors, however clear and harmful the violations, to hang and turn slowly and helplessly in the wind of a legal no-man's land.

Altogether, there is little, if any, likelihood that the reasonably thoughtful will be misled by the subject majority opinion into trusting in a rule of absolute and unassailable SLA discretion without regard to the clarity and harm of federal agency violations. The petition cites no other court of appeals authority for such a notion, and we know of none. In all events, the present decision of the Court of Appeals

neither denounced that notion nor needed to and cannot be understood as in irreconcilable "conflict" with it.[4]

The Act impacts on a relatively few, and, during the nearly quarter century that the procedure to resolve vendor-SLA disputes has been part of it, the decisions involving that procedure have been sparse indeed. The plain truth is that questions in regard to that procedure in general, let alone the shadowy one now at hand, are likely to recur rarely at most in the foreseeable future and to be of narrow reach in all events compared to the plethora of federal questions of widespread concern to the country at large which arise on a regular or even daily basis and which can legitimately be said to be needful of attention at the highest judicial level.

In short, the purported but phantom complete-discretion issue is barred at the threshold, but, even if it were not, it is far from an "important" let alone "compelling," matter of the kind specified in this Court's Rule 10.[5]

II. The Panel Power Question

The State's ungainly clutching for inclusion in its certiorari quiver at what its own hand buried below surfaces again as to whether vendor-SLA arbitrators have power to grant damages relief if found appropriate. The State is so intent on the disinterment as to be unembarrassed, evidently, by its failure to file a petition for rehearing to undo the asserted error of the Court of Appeals in attributing to it a concession of such power. There can be no doubt that the State affirmatively acknowledged such power in its own brief to dismiss the arbitration (App. 4) and that in none of its pleadings in the District Court was the Act itself, that is, aside

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[4] Given the State's failure to raise the point with due diligence, even the Court of Appeals' holding is not contrary to it.

[5] In urging denial of the petition, the federal respondents in their brief (pp. 7-8) point out that the State is not here in a position to raise the complete discretion question. Significantly, too, even amici curiae do not include that question among the ones said to be presented and shy throughout from joining hands with the State in that regard.

from the alleged bar of the Eleventh Amendment, invoked as prohibiting a damages award. Once more thwarting the State at the threshold, therefore, is the aforecited rule barring on review questions not duly raised or preserved below.

Substantively in any event, the petition, without succor from amici curiae, suffers from several shortcomings in urging this Court to resolve this question. Naturally for starters and without more, one is inclined to take with a sizeable grain of salt assertions so belatedly espoused at such odds with the State's stances below. It is hard to credit seriously a position the State would obviously have found advantageous to advance from the outset of and throughout the litigation had it in fact been thought reasonably tenable.

Not surprisingly, therefore, candid focus on the Act's purpose and its provisions for arbitration of vendor-SLA disputes quickly negates the remedial handcuffing conjured up by the State in myopic afterthought. Obviously, the basic purpose of the Act is to ease the economic plight of the blind by enhancing their opportunity to earn money through establishment of a valuable vending priority. (20 U.S.C. 107(b), App. 1, p. 1.) That monetary orientation, of course, necessarily configures as well the responsibilities of the SLAs undertaking to implement and administer the Act. Potentially and intimately at stake depending on faithful or derelict SLA function is the difference between realization or loss of vendor earnings or opportunity to earn. This is clearly so whether the particular SLA function focused upon is, for example, the issuance or revocation of a vendor's license, the installation or maintenance of adequate vending facility, the taking of action against a federal agency violating a vendor's priority, or the proper application of money collected from vendors as "set-aside" fees under the Act.[6]

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[6] In accord with the Act (20 U.S.C. 107b), the funds to meet much of the cost of the State's blind vending program (*e.g.*, purchase of equipment and fixtures, construction and maintenance of vending facilities, and benefits such as health insurance and pension plans), are derived from "set-aside" fees collected by the State from the vendors themselves and are held

Particularly against that telling backdrop, it is inevitable that much or most, if not all, of SLA conduct potentially open to dispute by vendors will concern money in some way, naturally including claims for money already lost in some situations. Thus, from the text of the Act, it clearly and manifestly follows that lost-money grievances were intended to be among those for whose resolution at a vendor's behest Congress mandated the arbitration and other procedure in 20 U.S.C. sections 107d-1(a) and 107d-2, having taken in section 107b(6) exquisite introductory care to exact from every SLA an express and specific observance commitment of contractual dimension. (App. 1 hereto.) After all, the only expression definitive of the kind of vendor-SLA dispute to be so resolved is the term "any," a term unmistakably of all-inclusive reach in common usage.

The State strays in precisely the opposite direction from the true mark in urging that the lack in the Act of express and specific authorization of damages as a remedy is fatal to the arbitral granting of relief in that form. That maladroitness is compounded by inapt reliance on *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), which is not a remedies but a liability decision. It involves an entirely different statute and the obviously different question of whether the word "person" served to bring the States of the union within the ambit of the prohibitory provision at issue there. In holding in the negative, this Court reasoned among other things (at p. 64) that "person" does not include "the sovereign" in common usage.

What the State misses is that the Act is silent not just as to damages as a remedy but as to any and all remedies appropriate in the context of vendor-SLA arbitrations, a fact tellingly signifying inclusion rather than exclusion of damages among the potential remedies intended. Obviously, instead of undertaking the onerous and even precarious task of attempting to forecast a remedial construct sufficiently and

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in trust for use for the limited purposes specified. (Calif. Welf. & Inst. C. § 19629.)

variantly responsive to the all-inclusive SLA violations made subject to the process, Congress sensibly empowered the fault-finding arbitrators in a particular case to resort to the remedies otherwise commonly available in the federal legal system in fashioning the relief determined to be most appropriate in light of the nature of violation and harm found. That approach was hardly iconoclastic; it is in accord with established general principles of longstanding applicability where a cause of action to sue in vindication of a federal right exists and Congress has been silent on the question of remedies. (*E.g., Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 69-71 (1992).) Thus, it is easy to understand why, in holding in favor of the Act's authorization of damages, the Courts of Appeals for the Sixth and Third Circuits included in their cogent reasoning (in addition to the clear thrust of the Act otherwise) the absence from the Act of anything ousting retroactive compensatory relief and attorneys' fees in spite of the well known use of such relief at the time in arbitrations generally. (*Tenn. Dept. of Human Serv. v. U.S. Dept. of Educ.*, 979 F.2d 1162, 1165 (6th Cir. 1992); *Delaware Dept. of Health v. U.S. Dept. of Educ.*, 772 F.2d 1123, 1136, *et seq.* (3rd Cir. 1985).)

Predictably in the foregoing and clear light, the State's account of sharp circuit division on the question is errant and grossly overblown. To begin with, the Eleventh Circuit's aforediscussed decision in *Georgia, supra,* 915 F.2d 1482 did not overturn the damages award on the ground of a general lack of power to make such an award under the Act where appropriate but on the ground of no liability for any relief. In actuality, the court (at p. 1492) cited in passing and with seeming approval the Third Circuit's decision in *Delaware, supra,* applying the Act as authorizing damages.

The decisions holding in the affirmative on the authorization issue, that is, the one by the Court of Appeals here (Pet. App. A, pp. 8-9) and the ones by the Courts of Appeals for the Sixth and the Third Circuits in *Tennessee, supra,* and *Delaware, supra,* are each unanimous. In the three-way opinions in *McNabb v. U.S. Dept. of Educ.*, 862 F.2d 681 (8th Cir. 1988),

the dissent of Judge Lay (at pp. 684-685) joins the authorization group. Judge Fagg (at pp. 685-687) rejects authorization of damages of any kind. In an opinion appearing to be based more on the bar of the Eleventh Amendment than on the terms of the Act as such, Judge Doty compromises the issue, concluding, somehow, that the Act authorizes prospective but not retrospective damages (at pp. 687-688).

Thus, an accurate tally inclusive of the approving dictum in *Georgia* shows that, of the fifteen court of appeals judges in five Circuits who can be said to have addressed the issue squarely, no less than thirteen have recognized the Act's authorization of damages as a remedy, only one has declined to do so, and the other neuters the issue through conglomeration with the Eleventh Amendment.[7]

Nothing of merit to rescue the petition on the issue is added by amici curiae, who, in spite of the Court of Appeals' alert, have ignored that the State whose unfit coattails they clutch gave away the store below. To the scant extent they try legal analysis at all instead of "scare tactics," they parrot the State's mistakes, including the avowal of sharp circuit conflict. In the same indiscriminate way, they blend in a pinch of inapposite authority of their own. For example, undaunted by the obvious fact that the Act is the measure of vendor remedies against SLAs and does not refer to the APA for remedies but solely for review purposes, they drag in by the heels 5 U.S.C. § 702, which, of course, can touch at most the remedial exposure of such *federal* parties as come within the basic design of the APA.

The main theme of amici curiae is a transparently bogus one. The pretense is that, if allowed to stand, the decision of the Court of Appeals is so revolutionary that it will cause the States in general to reconsider and drop participation in the Randolph-Sheppard program and an array of other programs

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[7] That the reasoning of the overwhelming weight of court of appeals' decisions regarding the Act has been so cogent as to induce the federal respondents to depart from their erstwhile anti-power view noted by the State serves to belie rather than indicate a need for this Court to decide the issue.

under far-reaching enactments, all out of fear of the avalanche of greedy and bankrupting claims unleashed.

No twisting can hide that, aside from the State's fatal concession, the Court of Appeals' decision rests on nothing which has not been reported for years, including *Delaware*, decided more than a decade ago; that the Act is a special and unique creature, entirely unlike the other enactments alluded to; or that, in the more than ten years since *Delaware*, the incidence of successful damages claims against SLAs has been minuscule and will, in the last and just analysis, increase if at all due not to courts but to the dictates of the Act and proof of SLA abuses.

The explanation, we suspect, for the appearance of amici curiae is the hope that joinder in the State's outcry by eleven more of such important entities will impress the Court that the matter sought to be raised is also important and needful of attention. Far more impressive in that light, we submit, is that thirty-eight states have stayed away in spite of, no doubt, the present State's general campaign to recruit amici from among its sisters. (See, magazine excerpt reproduced and attached hereto as Appendix 8.)

In sum, the panel power issue is foreclosed at the threshold and is the subject at worst of a dwarfling conflict in the Circuits. The Court of Appeals' decision is in accord with the clear weight of Circuit authority which is in turn faithful to the clear intent of the Act. Wide recurrence of the issue is unlikely in view of the Act's inherently small reach and the historic dearth of litigation under it. Nothing is remotely at hand amounting to a "compelling" or even "important" reason for a grant required by Rule 10.

III. The Eleventh Amendment Question

There are multiple threshold obstacles to granting of the petition to resolve whether the Eleventh Amendment bars enforcement in a federal court of an arbitral award of damages found to be appropriate under the Act to redress SLA defaults. We welcome in that regard the demonstration by the federal respondents' brief (at pp. 8-9, 10, 12, *et seq.*) of some

of the considerations standing cogently in the way. Since the State was not duly diligent to raise or preserve any liability question now claimed, the case is not a suitable vehicle for resolution of a remedial issue. Also, it seems unavoidable that the point can be disposed of purely as a matter of statutory construction without ever reaching the Amendment because the Act authorized the damages award under a procedure potentially leading to federal court under the APA and to which every SLA has unmistakably been required to consent by the Act.

Yet another complication tending to undermine suitability of this case as a vehicle for the question is the one which the petition contrives to hide. As we have seen, the present arbitral award grants important injunctive relief of futuristic reach, not just compensation as to the past.[8]

Still more, and perhaps most telling of all, we think, the State is foreclosed at the threshold (that is, quite apart from the waiver exacted by the Act, discussed later) by its waiver of the Eleventh Amendment flowing from the circumstances surrounding its own selection of a federal court in which to commence this very action with the aim of invalidating the arbitration award. Important to recall is that the attacks on the arbitration included grounds for invalidation other than the unenforceability of the award under the Eleventh Amendment.[9]

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[8] The State's distortion of the relief granted is aimed, we think, at avoidance of the undermining complication not just factually, but legally as well to avoid the doctrine that the Eleventh Amendment does not bar injunctive relief against individuals who are State officials in charge and have been made parties.

[9] In addition to the claims of denial of due process in the arbitration noted above, which continued to be pressed throughout in the courts below, the State's initial pleading contained an attack illustrative of its reckless determination to "win" this case (manifesting itself in various ways). It even alleged the unconstitutionality of the Randolph-Sheppard Act in its entirety, the very foundation of the State's own blind vendor program and of like programs throughout the nation and the raison d'etre of financing

It is inescapable that, by its own choice of forum, the State opened the door to the potential exercise of federal jurisdiction over itself unhampered by the Amendment. After all, one potential outcome obvious from the start was that, if the court rejected all of the State's attacks on the award, a natural concomitant of such rejection (even in the absence of a counterclaim) would be for the court expressly to uphold and enforce an award which the Act made clear was to be final and "binding on the parties" unless overturned on APA review. (20 U.S.C. §§ 107d-1(a) and 107d-2(a).) Such a concomitant ruling in the event of the State's failure was especially foreseeable and virtually invited since, unless her counsel was asleep at the switch, Ms. Martin was almost certain to file a counterclaim for confirmation and enforcement lest her rights be otherwise lost by operation of the compulsory counterclaim rule (Fed.R.Civ.P. Rule 13(a), App. 2 hereto). Her claim not merely arose from the same transaction or occurrence as the State complained of but was the reverse side of the very coin the State had put into the judicial hopper. Significantly, there is decisional authority that a compulsory counterclaim need not be shown to have an independent basis otherwise for the court's jurisdiction over it and that a pleading seeking to invalidate an administrative award makes a counterpleading to uphold the award compulsory. (*E.g., Glen Falls Indemnity Co. v. United States*, 229 F.2d 370, 373-374 (9th Cir. 1955); *Burlington Northern, Inc. v. American Ry. Supervisors Ass'n*, 527 F.2d 216, 223 (5th Cir. 1975); *Matter of Arbitration Between Intercarbon Bermuda*, 146 F.R.D. 64 (S.D.N.Y. 1993).)

There is also a feature of the APA, referred to by the Act, which merits emphasis at this point. The APA makes it

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such programs to an overwhelming extent by federal "matching" funds together with "set-aside" fees collected from the blind vendors themselves under the Act. The wild attack on a wholesome enactment of sixty years' standing was expunged from the amended pleading in, no doubt, understandable though slow alarm at the folly of burning down the house to roast the pig.

expressly clear that "judicial enforcement" is included within "judicial review." (5 U.S.C. § 703.)

In such circumstances, it would, we submit, be unconscionable to leave the State free, at one and the same time, to chance invocation of federal court jurisdiction to the end of hoped-for self-advantage and yet to reserve the shield of the Eleventh Amendment in the event of failure and consequent and foreseeable confirmation and enforcement of the award in accordance with the compulsory counterclaim.

Once more in all events, the petition because of substantive deficiencies fails to show occasion for this Court to intercede on an Eleventh Amendment issue. Since those deficiencies essentially parallel the ones we have shown above to exist as to the panel power issue, brief recapitulation of what we have pointed out as to that issue should suffice now with a few additions.

All that is needed is candid focus on the text of this special and unique Act's network of pertinent provisions which, "clearly" and "manifestly" and at least by "overwhelming implication," require every SLA to consent to a waiver of the Amendment in order to qualify as a SLA. Such focus is eschewed by the State, which contents itself with empty rhetoric and self-proving conclusions as to what the Act does not do. It is poppycock that the decisions of the Court of Appeals here and of the one for the Third Circuit in *Delaware, supra,* rest solely on the provision for vendor-SLA arbitration and the fact that compensatory relief is awarded in arbitrations generally.

We recall from above: In view of the monetary orientation of the Act's very purpose and thus necessarily of SLA functions, it is inevitable that SLA conduct open to dispute by vendors will include those causing loss of money in some instances. It follows that such lost-money claims are among the disputes for whose resolution at a vendor's behest Congress has mandated a process inclusive of arbitration. The only definitive expression of the kind of disputes to be so resolved is the all-inclusive word "any." And Congress has taken introductory care in mandatory terms with use of the

word "agree" to exact from every SLA advance commitment to honor the resolution process.

We remind now as well that arbitral outcomes in the all-inclusive vendor-SLA process are unmistakably intended to be dispositive in view of their entrenchment as "final and binding on the parties" unless overturned on APA review. Without question, the potential to end up subject to the jurisdiction of federal courts is part of the all-inclusive process to which SLAs have consented. Under 5 U.S.C. § 703, the APA venue section, the proper court for review is "a court of competent jurisdiction," a phrase which, in light of the involvement of a federal underlying Act, must necessarily include, if not exclusively designate, federal courts.[10] And because, under the same APA section, the term "judicial review" expressly includes "judicial enforcement," and is clearly consistent with the intention that the arbitral outcomes be "final and binding on the parties," it is obvious that the process to which SLAs have consented may result not just in affirmance by a reviewing court but in enforcement by that court as well. Certainly, it is absurd to suppose that Congress envisioned two separate suits in two different courts concerning the same arbitration, one by the loser to have the award overturned and the other by the winner to enforce it.

On this question as well, the State cries out that the Act says nothing about damages as a remedy, ignoring that the Act is silent as to any remedy in vendor-SLA arbitrations, thus revealing potential inclusion of damages if appropriate among the intended remedies in conformity with the rule applied in cases such as *Franklin, supra.*

Such decisions of this Court as the State cites in a futile effort to manufacture a conflict with the Court of Appeals' decision involve enactments entirely different from the present one and lack anything remotely close to the network of

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[10] Significantly, at least two decisions that we know of treat the phrase under consideration as leading only to federal district court. (*Fillinger v. Cleveland Society for the Blind*, 587 F.2d 336, 338 (1978); *Mass. Elected Committee of Blind Vendors v. Matava*, 482 F.Supp. 1186, 1189 (1980).)

dispositive provisions, except for *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), which held in favor of waiver of the Amendment under the "overwhelming implication" test.

In accord with *Delaware* and faithful to the dictates of the text of the Act, the Court of Appeals here held against the bar of the Amendment, correctly relying on the holding of and test applied in *Port Authority*. It is true that the Court of Appeals held to the contrary in *Tennessee, supra,* 979 F.2d at p. 1168, *et seq.*, even though it also first held that arbitration panels have power to award damages under the Act. It seems doubtful that, in view of intervening developments including the Court of Appeals' present decision, *Tennessee* on this point will be followed even in that Circuit or be of influence elsewhere. Its reasoning on the point is readily seen to be far from ideal. For one thing, it seems internally inconsistent since the power and the Amendment issues are both disposed of with clarity and force by features of the same dispute-resolution process. Also, at various points, the opinion appears to wander into adoption of the stricter test applicable to cases involving the question of Congressional abrogation of immunity under the Amendment.

Because of the threshold impediments involved, this in no event is a case suited for raising or resolving the Eleventh Amendment issue. Moreover, the Court of Appeals has correctly responded to the clear dictates of the Act, which the State does not try to explain away with reasoning or the citation of apposite authority. Under the Court's Rule 10, even circuit conflict on an "important" federal question does not control or fully measure the Court's discretion, and the two-to-one conflict involved here is far from "important" in these circumstances. In view of the inherently small reach of the Act, and as attested to by the paucity of presentation of the point in the nearly twenty-five years the vendor-SLA process has been in existence, the chances of recurrence soon are slim and, in terms of wide impact, none. By no analysis can the matter be viewed as amounting to "compelling reasons" as required for a grant by Rule 10.

IV. The Practical and Equitable Considerations Calling for Denial

Much counseling against a grant of the petition could be said in terms of considerations which sound in good sense, avoidance of undue hardship, the orderly and expeditious administration of justice under our system, and just plain fairness. However, there is not world enough and time at the moment, so we must find comfort in the thought that a good deal of the sorry picture should be discernable from what we have already said above, as well as from the decisions below, particularly the detailed rehearsal in the arbitrators' liability opinion.

Suffice it now to point out that Ms. Martin, a woman nearly sixty years old and of starkly limited means, has been struggling for eight years to obtain relief by proceedings specified in the Act from multi-faceted wrongdoing at the hands of those charged with the obligation to protect her. The wrongdoing brought about financial disaster, including the wrongful termination of the very license indispensable to her livelihood. Nevertheless, she has persevered and succeeded through eight years encompassing administrative hearings, the arbitration, the district court and the court of appeals. She shudders at the threat of greater delay on account of the present petition, particularly since the State was not duly diligent to raise and preserve any of the questions now sought to be advanced. Moreover, she has been and remains mystified as to why a question like the Eleventh Amendment can possibly excuse the failure of the State to implement for years the important injunctive relief ordered by the arbitrators, including restoration of her license.

At every inch of the way, the State has doggedly fought her even with stances reflecting a reckless no-holds-barred determination to "win" the case. At one point, there was even a transitional readiness to jettison the Act as unconstitutional in its entirety. At every stage below, it did not hesitate to vilify her as the cause of her own misfortunes through incompetence and irresponsibility as a vendor though knowing full well that the State's own evaluations were directly to the

contrary. Even now, the petition is contrived to hide the true nature of the wrongdoing found by the panel and the courts, as well as the true nature of the relief involved.

The one solacing feature of Ms. Martin's plight is that the arbitration and decisions of the courts below have vindicated her rights under the Act and serve, if not now disturbed, to relieve one of the objects of the Act's solicitude. If ever a time comes (which we think inherently doubtful for reasons already indicated) when this Court is inclined to intervene to resolve any of the questions sought unfitly to be raised, let it be, we earnestly pray, in a case where the decisions below have resolved the issues in a manner turning a beneficiary of the Act away without relief – let it be also in a case where the petitioner has been duly diligent below to raise and preserve the issues.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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APPENDIX 1

[Selected Provisions of the Randolph-Sheppard Act]

20 U.S.C. § 107. Operation of vending facilities

"(a) Authorization. For the purpose of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

"(b) Preferences, regulations; justification for limitation on operation. In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that –

"(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

"(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States. Any limitation on the placement

or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register."

20 U.S.C. § 107b. Application for designation as State Licensing Agency; cooperation with Secretary; furnishing initial stock

"A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make special application to the Secretary and agree –

"(1) to cooperate with the Secretary in carrying out the purpose of this chapter;

"(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary . . .

"(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new

equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside for such purposes: *Provided, however,* That in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary;

"(4) to make such reports in such form and containing such information as the Secretary may from time to time require and to comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports;

"(5) to issue such regulations, consistent with the provisions of this chapter, as may be necessary for the operation of this program;

"(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title."

20 U.S.C. § 107d-1, Grievances of blind licensees, provides in relevant part:

> "(a) Hearing and Arbitration. Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

20 U.S.C. 107d-2, Arbitration, provides in relevant part:

> "(a) Notice and Hearing. Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for the purposes of chapter 7 of such title 5."

APPENDIX 2

Rule 13, Federal Rules of Civil Procedure

"(a) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot require jurisdiction. . . .

"(b) Permissive counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject of the opposing party's claim."

APPENDIX 3

DEPARTMENT OF REHABILITATION
830 K St., 2nd Floor
Sacramento, CA 95811

(916) 322-2070

October 6, 1989

Postmaster
U.S. Postal Service
3101 W. Sunflower
Santa Ana, CA 92799

Dear Sir:

The Department of Rehabilitation, Business Enterprise program would like your support in correcting an unacceptable violation of the Randolph-Sheppard Act at your facility. The blind vendor, Ms. Jeana Martin, has experienced more than a fifty percent loss of income due to unfair and direct competition which started when your private vending machine contract was renewed September 1, 1989. Prices were immediately reduced in the private machines thereby reducing the volume of sales in the blind vendor's machines.

Further, the vending machine income owed to Ms. Martin has not been paid by your organization for the period of October 1988 through September 1989.

The Department views the actions of your organization to be in violation of the letter and spirit of the Randolph-Sheppard Act (20 U.S.C. 107) and supporting federal regulations (34 CFR 395).

We hereby request a meeting with you to immediately resolve this problem. Time is of the essence and unless the matter can be quickly resolved, the Department of

Rehabilitation will be forced to pursue any and all remedial steps allowed by law.

Your prompt attention and response is most appreciated.

Sincerely,

HAO Q. LAM, Deputy Director
Program Management
& Support Division

HQL:11

cc: Don D. Edmon
Jeana Martin

APPENDIX 4

[Excerpt from State's brief supporting motion to dismiss arbitration]

* * *

[p. 14] **CONCLUSION**

Complainant has filed a Complaint which on its face is flawed. It is subject to the defense of absolute immunity. This panel has the jurisdiction to hear the issues raised by Ms. Martin, and to award her damages, yet if to does so, Ms. Martin has no means by which to enforce the award. Dismissal of the Complaint for Arbitration and Supplement is the only means by which to avoid the misuse of time and taxpayers' dollars. The State of California respectfully requests that this panel exercise its authority to dismiss the existing Complaint and Supplement, on the basis of the sovereign immunity of the State of California.

Dated: December 9, 1993

Respectfully submitted,

/s/ Gwynne Pratt Bacigaluppi
GWYNNE PRATT BACIGALUPPI
Acting Chief Counsel
Department of Rehabilitation

Attorney for Respondent
Department of Rehabilitation
State of California

APPENDIX 5

[Excerpt from State's opening memorandum supporting district court motion to disqualify the arbitration panel and to reverse and remand to new panel]

* * *

[p. 12] remodeling, she not only made an increased profit but also improved customer relations immediately.

However, the panel chose to ignore all evidence the plaintiff as respondent presented at the arbitration. The panel ignored the testimony of both Don Edmon and David Lyman and dismissed their testimony by stating incorrectly that the respondent's "denigration" of Complainant was unwarranted. (Exhibit B, page 29, 2nd paragraph) The panel accepted all Martin's letters over respondent's live testimony, the panel accepted uncorroborated, self-serving statements by complainant over all of the respondent's-department's witnesses. It was, therefore, inevitable that the panel would arrive at a decision on both liability and damages that was not only clearly erroneous but without "substantial evidence" to support it.

The panel ascribed "binding" precedential value to a 1981 San Francisco arbitration case taken out of context, never litigated beyond arbitration, and never given the force of law by any tribunal. (See page 29 of Exhibit B, first paragraph) Without authority and without any semblance of reason, the panel gave "great weight" to this unpublished, uncertified, and unrecognized arbitration decision. This was improper, illegal, and an abuse of discretion. An attorney who relies on unpublished opinions is sanctioned. The panel should be sanctioned.

In *Georgia Dept. of Human Resources* v. *Bell*, 528 F.Supp. 17, 24 (1981), the court clearly recognized that the state licensing agency (SLA) has *discretion* to file a complaint whenever a licensed blind vendor so requests. The Act imposes an [p. 13] obligation on the SLA to protect the vendor's "priority". The SLA must "pursue" a vendor's grievance when the vendor's rights are arguably being jeopardized by the Federal agency's actions.

Here, the panel discounted the efforts of Mr. Edmon to settle the dispute without the need for arbitration. The panel denigrated Mr. Edmon's efforts, substituting their Martinet-like judgment for a rational and measured approach. The panel improperly ignored the "discretion" that the court in *Georgia Dept. of Human Resources* v. *Bell* found. The fact is the plaintiff-respondent "pursued" Martin's grievance and protected Martin's rights as much as practical, as the evidence showed. The panel capriciously, unfairly, and without justification ignored the law and the plaintiff's evidence. The panel repeatedly abused its discretion.

Even the U.S. Department of Education itself, the panel's own empowering agency "encourages" both "parties involved to meet and discuss the issues, employing all reasonable efforts to reach an amicable settlement of the dispute." (See Exhibit A, third paragraph). The plaintiff-respondent adopted the same policy in dealing with the GMF but the panel, unrealistic in the extreme, capriciously found that insufficient.

The panel clearly found, in so many words, that though the work "priority" is used in the Act that the law should say "exclusivity", that no matter what Martin did

that she should be guaranteed a certain level of income, i.e., that the Act, rather than legislating a program of self-support, renumerative [sic] employment and the furtherance of economic opportunities for the blind, is, in fact, a thinly veiled welfare program for the

* * *

APPENDIX 6

[Excerpt from State's district court reply to defendants' oppositions to State's disqualification/remand motion]

* * *

[p. 5] In *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482, 1488-1489, (11th Cir. 1990), the court held that the Randolph-Sheppard Act gives a State Licensing Agency (SLA) like the plaintiff herein, "*complete discretion* both to determine that a federal entity is not complying with the Act and to file a complaint in the case of noncompliance." (Emphasis added) The court found that 20 U.S.C. section 107d-1(b) mandates no procedures or substantive rules to govern either of the determinations mentioned supra. It was plainly the call of the plaintiff whether the General Mail Facility in Santa Ana was complying with the Act and whether to file a complaint for non-compliance against the GMF. It was, and is, therefore, error on the part of the arbitration panel to order compliance and error on the part of the defendants to assert that the panel was correct in ordering compliance.

The court in *Nash* (supra) applied an abuse of discretion burden on the *vendor* in both (1) showing that the state agency there abused its discretion in not determining that the federal facility was not in compliance and that, (2) even if the federal facility was not in compliance, that the state agency committed an abuse of discretion in not filing a complaint. (See *Nash*, supra, p. 1489-1490.)

The court concluded and ruled that the vendor may invoke the grievance procedures guaranteed under 20

U.S.C. section 107d-1(a), but "the vendor has *no substantive right to challenge* a state licensing agency's failure to bring a complaint pursuant to 20 U.S.C. section 107d-1(b)." (*Nash*, supra, p. 1495.)

[p. 6] Here, the plaintiff pursued Martin's grievances in the most expeditious manner possible to protect Martin's rights under Randolph-Sheppard and to effect a solution compatible with the Federal agency here involved. Though Martin is now dissatisfied with plaintiff's efforts, Martin has no substantive right to challenge this plaintiff's decision not to adopt the autocratic, non-business-like methods Martin and the panel would apparently prefer. Plaintiff under *Nash* has full discretion to resolve the matter in whatever way plaintiff sees fit. Martin alienated her customers at the Santa Ana Postal Facility (the General Mail Facility or GMF) and the GMF provided a contract for vending machine maintenance to another vendor. Plaintiff stepped in and did resolve the dispute by placing another vendor in the GMF (Patricia Evans) and giving Martin other facilities plus additional funding, plus support in the form of Joanne Gelfeld. The record is clear that plaintiff administered the Business Enterprise Program for Blind Vendors in a business-like manner.

Plaintiff exercised her business judgment and full discretion not to file and pursue a complaint against GMF but rather to place another vendor who successfully managed the facility at the GMF. Martin, though given another sizable facility at the Hall of Administration in

Los Angeles, could not correct her poor business practices. The panel ignored the evidence of plaintiff completely and, in so doing, blatantly denied plaintiff due process.

Plaintiff cannot now be denied her discretion under *Nash* and the Randolph-Sheppard Act, and both the defendant Martin and the Arbitration Panel are clearly in error in thinking they

* * *

APPENDIX 7

[Excerpt from State's district court reply to defendants' opposition to State's disqualification/remand motion]

* * *

[p. 8] court, so egregious was the denial of due process, so egregious the capriciousness of the panel's decisions.

The Federal defendants assert that the Fifth Amendment due process clause does not apply to states, such as plaintiff. (See Federal defendants moving papers-points and authorities p. 7, line 22 to p. 8 line 18.) However, it is inconceivable that plaintiff, whether a "state" or a "person" should be denied the rights and privileges connected with concepts of "due process" and "fundamental fairness" by an ad hoc arbitration panel appointed to seek the truth and resolve a dispute. Such a narrow interpretation is itself wholly inequitable and unjust. The Federal defendants are saying, in essence, that a pure legalism should be allowed to defeat the fair administration of the Act's arbitration process, a process into which plaintiff entered and in which plaintiff participated in good faith.

However, the provisions of the Administrative Procedure Act (APA) for review, set out by the Federal defendants on page 7 of their points and authorities speak directly to abuses of discretion, arbitrary and capricious decisions and decisions running counter to admitted evidence. Essentially, then, the standard to be applied by the court here should be one of fundamental fairness, i.e. due process. Couched in different terms, the standard of review to be applied by this court is one of due process to all parties by avoiding the antithesis of due process, arbitrariness and capriciousness. Therefore, whether

under the label "due process" or under a standard set out in the APA, and cited by the Federal defendants, the goal of fundamental fairness remains the same.

[p. 9] Plaintiff is, therefore, prepared to file a third amended complaint (Exhibit A) which changes Paragraph 20 of the Second Amended Complaint to one encompassing the standards set out in the APA. However, in the interests of judicial economy, plaintiff believes the issue of the panel's arbitrary decision should be litigated now using cited APA standards.

Further, the Federal defendants assert that the arbitration was not conducted in a capricious and arbitrary manner. Yet the standard of review the Federal defendants cite includes as factors to be considered in a review: ". . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency. . . . " (See Federal defendant points and authorities p. 7, lines 12-15).

The arbitration Panel failed to consider Martin's own conduct and business shortcomings in arriving at its decision. The panel failed to consider the financial reports submitted that showed that Martin made a profit despite her transgressions. They failed to consider Martin's ongoing pattern of negligence, her tax problems, and the clear difference a competent vendor (Patricia Evans) made when placed at the GMF. The evidence presented by plaintiff, as respondent, to the panel does run counter to the panel's decision and its cumulative effect clearly demonstrates that the panel's decisions were arbitrary and capricious.

For example, the panel and the defendants cite no specific legal duty imposed on the plaintiff by the Act or its regulations that plaintiff must collect, account for, be

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APPENDIX 8

[Excerpt from page 48 of "Year-End Legal Tidbits" by Charles S.P. Hodge, *The Braille Forum* (vol. XXXVI, No. 6), published by The American Council of the Blind]

"In September I reported that the Ninth Circuit Court of appeals had affirmed the federal trail court's ruling in favor of Jeana Martin, a former licensed blind vendor in the California program, and had ordered the state licensing agency to pay considerable monetary damages to Martin. The attorney general of California has nevertheless sought Supreme Court review, and the California state licensing agency through the National Council of State Agencies for the Blind has invited other state licensing agencies to file amicus curiae or friend of the court briefs with the court endorsing California's legal position in the case. . . . "